(41343)

Supreme Court, U. S.
FILED
AUG 23 1974
CLERK, SUPREME COURT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1377

RUSSELL E. TRAIN, as Administrator of the United States Environmental Protection Agency,

Petitioner,

—v.—

THE CITY OF NEW YORK, on behalf of itself and all other similarly situated municipalities within the State of New York, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT THE CITY OF NEW YORK

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BRIEF FOR THE RESPONDENT THE CITY OF NEW YORK

Question Presented

Did the Petitioner-Administrator violate section 205(a) of the Federal Water Pollution Control Act when, at the direction of the President, he allotted among the states only five of the eleven billion dollars authorized by Congress for fiscal years 1973 and 1974, for federal assistance in the construction of sewage treatment works?*

* The question of sovereign immunity, although raised in the Administrator's petition for certiorari in this case (73-1377), is no

Statement

The Federal Water Pollution Control Act Amendments of 1972* completely revised the Federal Water Pollution Control Act (the "Act"). It created a comprehensive new program to clean up the nation's waterways. The Act now declares that it is the national goal to eliminate totally the discharge of pollutants into the navigable waters by 1985. Title II establishes a program to assist state and local governments to build the sewage treatment works that are needed to achieve that goal. This program provides for federal reimbursement to state and local governments of 75% of the cost of construction of such works.

The Act authorizes certain sums to be appropriated for each of the fiscal years 1973, 1974 and 1975 and establishes a funding mechanism, known as "contract authority," whereby the Administrator is empowered to enter into contracts, up to the authorized sums, to pay state and local governments the federal share of the cost of projects that he approves. There are three distinct stages in that process—allotment of the authorized sums among the states; the creation of contractual obligations by the United States to finance particular projects or phases thereof; and actual disbursement of federal money for reimbursable costs.

Allotment is prescribed in section 205, set out in full at pages 3-5 of the Government's brief. Subsection (a) directs

longer present here. The Administrator now concedes that if, as we contend, allotment is a ministerial act, then "the district courts have jurisdiction to order that it be done." Pet. Br. at p. 14.

* 86 Stat. 816. The Federal Water Pollution Control Act, as revised by the 1972 Amendments, is codified in 33 U.S.C. §§ 1251-1376.

that the authorized sums, which are the maximum amounts which the Administrator may obligate, "shall be allotted . . . not later than" six months before the beginning of the fiscal year for which they were authorized (except that the allotment for fiscal 1973 was to be within 30 days of enactment).* These maximum amounts are apportioned among the states in accordance with a congressionally-prescribed formula of the need for treatment works in the various states; such apportionment establishes state-by-state ceilings on the Administrator's contract authority. Subsection (b)(1) directs that allotted sums "shall be available for obligation" in a state from the allotment date and "shall continue available for obligation" for one year after the close of the fiscal year for which they are authorized. Any allotted amounts not obligated by then "shall be immediately reallotted" among the states and "shall be in addition to any funds otherwise allotted" to a state. There is no provision for total lapse of any of the authorized funds.

The second stage of the funding mechanism, sometimes called the obligational stage, is the stage at which allotted funds may be obligated by the United States. It is prescribed by section 203. After a state prepares a priority list of projects, the state or one of its local governments applies for a grant from the allotted funds for each project it proposes to build. It does this by preparing and submitting to the Administrator plans, specifications and cost estimates for the project. The proposal must meet the requirements enumerated in section 204, which include assurance that the applicant has taken whatever steps are required by local law to raise and commit the non-federal

* Thus the specified dates have all passed.

share of construction costs. The Administrator then reviews the application and, upon his approval, the United States becomes contractually obligated to pay the federal share of the cost of that project. The third stage, also prescribed in section 203, is reimbursement of the state or local government from time to time as construction progresses and vouchers are presented for actual costs incurred.

In deciding on contract authority funding, Congress rejected a Presidential recommendation for the more conventional authorization-appropriation funding, under which projects would be dependent for completion on uncertain annual appropriations. A related difference between Congress and the President concerned the size of the program. The President proposed a $6 billion effort. The Senate initially settled on $14 billion. The House decided on $18 billion and its view prevailed in the Conference Committee.

The Conference Committee did, however, adopt two amendments in the acknowledged hope of avoiding a veto. They are known as the Harsha Amendments after Representative William H. Harsha, the senior minority conferee from the House.* The words "not to exceed" were inserted in section 207, so that it authorized to be appropriated not to exceed $5 billion for fiscal 1973, not to exceed $6 billion for fiscal 1974 and not to exceed $7 billion for fiscal 1975. And the word "all" was deleted from the beginning of the sentence in section 205(a) which now reads "Sums authorized . . . shall be allotted . . . not later than . . . ." The

* Representative Harsha is also the ranking minority member of the House Committee on Public Works, which reported the House version of the Federal Water Pollution Control Act Amendments of 1972, and he was a floor manager of the bill.

general objective of the Amendments, as shown at pages 15-21 of the Government's brief, was to "emphasize the President's flexibility to control the rate of spending."

The President nonetheless vetoed the conference bill because $18 billion was too large a "commitment." He noted that the Act conferred upon him "a measure of spending discretion and flexibility." But, he said, "political realities" would lead to ultimate spending of the full $18 billion despite what he referred to as certain "technical controls" in the legislation. 118 Cong. Rec. S 18534 (daily ed. October 17, 1972). The veto was overridden 52-12 in the Senate and 247-23 in the House.

It was in this setting that the President on November 22, 1972 directed the Administrator to allot only $5 billion of the $11 billion that the Act authorized to be appropriated for fiscal 1973 and 1974. App., p. 15.* On December 8 the Administrator allotted the reduced amounts. 37 Fed. Reg. 26282 (December 8, 1972).**

On December 12, the City of New York brought suit in the District Court for the District of Columbia alleging that the Administrator was required to allot the full $11 billion for fiscal 1973 and 1974. The District Court granted the City's motion for summary judgment and the Court of Appeals unanimously affirmed.

The Administrator's position is that under the Act he may control the rate of spending by controlling the amounts

* References to the Appendix filed with the Administrator's brief will be designated "App." References to the appendix filed with the petition for certiorari will be designated by the letter "A".

** On January 15, 1974 the Administrator allotted $4 billion of the $7 billion authorized for fiscal year 1975.

to be allotted. The Court of Appeals below made a painstaking study of the extensive legislative history of Title II. While recognizing that the Act confers some discretion to control the rate of spending, the court concluded that such discretion was meant to be exercised only at the obligational stage. Thus, the court held, the Administrator acted illegally by reducing, at the allotment stage, the moneys available for obligation. 1A-34A.

Summary of Argument

The Harsha Amendments are the purported basis for the Administrator's action. The legislative history of those Amendments clearly shows that they were not intended to confer on the Administrator any discretion to allot less than the full sums authorized. Rather, the legislative history shows that the intent was only to emphasize that the Administrator would have some control over the rate of spending at the obligation stage of the funding mechanism. As would be expected, that intent is in harmony with the basic objective of Title II: to enable local governments to start planning forthwith the $24 billion* of needed treatment plants. Discretionary allotment would subvert that purpose.

The Government focuses only on those portions of the legislative history that show that the Administrator was to have some control over the rate of spending. It ignores the numerous indications that such control was to be exercised at the obligation stage. From this narrow perspective the Government attempts to formulate a construction of the Act which substantiates discretionary allotment.

* $18 billion of federal money and $6 billion of local money.

First, the Government asserts that the Administrator may make reduced "initial" allotments and subsequent "augmenting" allotments until the full $18 billion is "ultimately" allotted. Thus, it is contended, there is no "practical difference" between rate of spending control exercised at the allotment or obligation stage. Finally, it is argued, the court should defer to the expert judgment of the Administrator as to whether to control spending at the allotment or at the obligation stage.

There are several fatal flaws in the Government's theory. First, the concept of "initial" and "augmenting" allotments is conspicuously absent from the language of the Act or its legislative history. Moreover, even if the theoretical plausibility of the concept were accepted, it would occasion serious practical difficulties in the operation of the pollution control program. Finally, adoption of the Government's theory would impute to Congress the inherently improbable intent to empower the Executive to accomplish by administrative action substantially what the President was unable to accomplish by persuasion, warnings of a likely veto and veto itself.

POINT I

The legislative history of the Harsha Amendments shows clearly that their sole purpose was to emphasize that the Administrator would have some discretion at the obligation stage of the funding process to control the rate of spending.

The Government contends that the Harsha Amendments conferred on the Administrator "full authority" (Pet. Br. at p. 21) to control the rate of spending and that, accordingly, the Administrator has unreviewable discretion to determine at what stage to exercise such control.* The Administrator does not even purport to find in the legislative history support for the concept of discretionary allotment. Rather, he states only that Congress "did not focus upon the stage

* The Administrator also claims broad discretion with regard to the criteria applicable to the exercise of such control. For example, the Government states that "[s]uch control may be exercised in the interest of overall government fiscal policies that are not related to the particular program involved." Pet. Br. at p. 10. We have throughout this litigation adhered to the position that such discretion is more limited, *i.e.*, that it is circumscribed by the congressional purpose expressed in the Act. *See, e.g., Work* v. *United States ex rel. Rives*, 267 U.S. 172, 177-8 (1925). In our opinion *State Highway Comm'n of Missouri* v. *Volpe*, 479 F.2d 1099 (8th Cir. 1973), provides substantial guidance on this question.

In any event, the scope of the Administrator's discretion is not at issue in this case. We do direct the Court's attention, however, to the Administrator's assertion (Pet. Br., pp. 27-28) that, if the Court of Appeals is affirmed and he is directed to allot the remaining $9 billion, he will simply place those funds in a "reserve" account unavailable for obligation. Since we do not believe that the Administrator's obligational discretion is so unconstrained, such a "reservation" of funds would likely lead to further litigation. Accordingly, we respectfully request that, should the Court affirm, it foreclose any later argument that its possible silence in the face of this suggestion connotes approval of the theory propounded.

at which such control would be exercised." Pet. Br. at p. 22.

It might be difficult to discern with confidence the intent of Congress if there were available only the text of the Act and knowledge that the Harsha Amendments had been made. Even under those circumstances, however, the inconsistency of discretionary allotment with the underlying purposes of the Act and with the function of allotment in the funding mechanism, would cogently argue for imputing to Congress an intent to affect only the obligational process. Fortunately, though, there are also available clear explanations of the Amendments on the floor of both the Senate and the House. They make explicit an intent by the Amendments merely to emphasize that the Administrator could control the rate of spending at the obligation stage. They contain no indication of an intent to confer upon him any discretion at the allotment stage.

(1) *Senate Discussions.*

The history of the Senate's consideration of the Act reveals a clear understanding by that body that the Harsha Amendments did not alter the mandatory requirement of full allotment in fiscal years 1973-1975. In first explaining the Amendments, Senator Edmund S. Muskie, the senior majority conferee from the Senate,* told his colleagues:

> "The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the

* Senator Muskie is also chairman of the Senate Subcommittee on Air and Water Pollution, which reported the Senate version of the bill, and he was a floor manager.

> Federal Government in 75—percent grants to municipalities *during fiscal years 1973-75.*
>
> • • • •
>
> Under the amendments proposed by Congressman William Harsha and others, the authorizations for obligational authority are "not to exceed" $18 billion over the next 3 years. Also "all" sums authorized to be obligated need not be committed, *though they must be allocated.* These two provisions were suggested to give the Administration *some flexibility concerning the obligation* of construction grant funds."

118 Cong. Rec. S 16870-71 (daily ed. October 4, 1972). (Emphasis added.)* Senator Muskie expanded on the Administrator's flexibility by noting that "the conferees do not expect [it] . . . to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the Act." *Ibid.* He then noted that in instances where the Administrator's flexibility was to be exercised, "the conferees would, of course, expect the administration to refuse to enter into contracts for construction." *Ibid.* In sum, then, Senator Muskie's remarks made it clear that the Act envisages the allotment of $18 billion over three fiscal years and that the Administrator's flexibility over the rate of spending is to be exercised only at the obligation stage.

After the veto Senator Muskie repeated the exact words, quoted above, he had used before the veto to explain the Harsha Amendments. *Id.* at S 18546 (daily ed. October 17, 1972). He then went on to illustrate the budget impact

* The original Senate bill used the term "allocate." The Administrator agreed below that Senator Muskie's use of "allocate" instead of "allot" was of no import. 21A n. 19.

of the Act by introducing a table showing the "Rate of Expenditures" under the Act in fiscal years 1973 through 1979.* *Id.* at S 18547. He gave the following explanation of the table's data:

> "The second year we would spend $1.3 billion. The third year we would spend $3.05 billion. The fourth year we would spend $5.2 billion.
>
> That is spending. It takes time to crank up these waste treatment facilities. It takes time to build up the bricks and mortar. That is why it would take 7 years to spend *the money that would be subject to contract authority in the next 3 years.*"

Ibid. (Emphasis added.) It is evident from the table and Senator Muskie's discussion that the full $18 billion must

* RATE OF EXPENDITURES BY FISCAL YEAR[1] UNDER AUTHORIZATIONS OF S. 2770[2]

[in billions]

	Fiscal year 1973	Fiscal year 1974	Fiscal year 1975	Total
Fiscal year:				
1973	$0.25	----	----	$0.25
1974	1.00	$0.30	----	1.30
1975	1.50	1.20	$0.35	3.05
1976	2.00	1.80	1.40	5.20
1977	.25	2.40	2.10	4.75
1978	----	.30	2.80	3.10
1979	----	----	.35	.35
Total	5.00	6.00	7.00	18.00

[1] 1st year, 5 percent of authorization; 2nd year, 20 percent of authorization; 3d year, 30 percent of authorization; 4th year, 40 percent of authorization; 5th year, 5 percent of authorization.

[2] Fiscal year 1973, $5,000,000,000; fiscal year 1974, $6,000,000,000; fiscal year 1975, $7,000,000,000.

The figures in the table were based upon the Administrator's estimates of the rate at which the allotments would be obligated.

be allotted in fiscal years 1973-1975, for only then would the money be "subject to contract authority" in those years. Since the amounts available for obligation in the three fiscal years are thus fixed and determined, the "rate" of spending can be controlled only by controlling the time period over which these fixed amounts are obligated. Thus, although the Administrator is technically correct in asserting that "a rate can be reduced either by reducing the amount or extending the time period" (Pet. Br. at p. 25), the salient fact here is that the statute precludes reduction of the amount. It is for this reason that the table depicts the "rate" at which the allotted sums will be spent in terms of the time period (*i.e.*, fiscal years 1973-1979) during which such sums will come due for appropriation after obligation by the Administrator.

It should be noted, too, that at no time during the long debates was Senator Muskie's explanation of the Act's important funding provisions ever challenged. Surely, other Senators, particularly other conferees, would not have remained silent if they disagreed with those crucial statements. *See, National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U.S. 453, 460 (1974).

(2) *House Discussions.*

In the House there was no explicit mention of allotment. However, Representative Harsha and others recurringly described the activity affected by the Harsha Amendments with the words "obligation or expenditure", "obligate or expend", "obligation and expenditure", "expenditures", and "expenditures and appropriations". Thus, for example, a pre-veto colloquy among Representative Harsha, then-Representative Ford and Representative Jones, chairman of the House conferees, went as follows:

> "Mr. GERALD R. FORD, Mr. Speaker . . . I think it is vitally important that the intent and purpose of section 207 is spelled out in the legislative history here in the discussion on this conference report.
>
> As I understand the comments of the gentleman from Ohio [Harsha], the inclusion of the words in section 207 in three instances of "not to exceed" indicates that it is a limitation. More importantly that it is not a mandatory requirement that in 1 year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*
>
> Mr. HARSHA, I do not see how reasonable minds could come to any other conclusion than that the language means we can *obligate or expend* up to that sum—anything up to that sum but not to exceed that amount . . . .
>
> Mr. GERALD R. FORD. Mr. Speaker, I would like to ask the distinguished chairman of the subcommittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio (Mr. Harsha).
>
> Mr. JONES of Alabama . . . . My answer is "yes." Not only do I agree with him but the gentleman from Ohio offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio (Mr. Harsha).
>
> Mr. GERALD R. FORD. Mr. Speaker, this clarifies and certainly ought to wipe away any doubts anyone has. The language is not a mandatory requirement for full

> *obligation and expenditure* up to the authorization figure in each of the 3 fiscal years."

118 Cong. Rec. H 9123 (daily ed. October 4, 1972). (Emphasis added.)

In assuring Representative Ford that there need not be "full obligation" in fiscal years 1973-1975 of the sums specified in section 207, Representative Harsha plainly indicated his understanding that those sums nevertheless had to be allotted. For otherwise he would not have stated that "we can obligate or expend up to that sum," since only allotted sums may be obligated and spent.

Representative Harsha's discussion of "impoundment" under the Federal Highway Act, reproduced at page 17 of the Government's brief, also indicates that control over the rate of spending was not to be exercised at the allotment stage. It had always been the Government's position that spending control under the Highway Act could be exercised at the obligation stage, but that the allotment of funds was nondiscretionary. *See State Highway Comm'n of Missouri* v. *Volpe,* 479 F. 2d 1099, 1107 n. 8 (8th Cir. 1973); *and* HEARING ON EXECUTIVE IMPOUNDMENT OF APPROPRIATED FUNDS BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE SENATE COMMITTEE ON THE JUDICIARY, 92nd Cong., 1st Sess. 80 (1971) (testimony of F. C. Turner, then Federal Highway Administrator). The Government concedes as much here. *See* Pet. Br., p. 27. Thus, it cannot be gainsaid that, in saying that spending control can be exercised under the Federal Water Pollution Control Act by the "same means" utilized under the Highway Act, Representative Harsha was referring to control exercised at the obligation stage.

There is no doubt that in using the words "obligate" and "expend" the Representatives were using with discrimination the words of contract authority funding. The reference to the highway statute confirms this conclusion. These were veteran legislators. The conferees among them had been through hearings before a House committee and prolonged and detailed Conference Committee deliberations.* Under these circumstances, the failure expressly to disavow any effect on allotment only reflects the fact that no one conceived of any such effect.

An explanation Representative Harsha offered on the Act's fiscal impact bears out that conclusion. After calling attention to a table showing that the first major impact of "the $5 billion" authorized for fiscal 1973 would be in fiscal 1975, he said:

> "As a matter of fact, for fiscal year 1973 *if all the money were obligated* and placed under contract, there would only be $20 million needed to meet the obligations and in fiscal year 1974 there would only be the necessary appropriation of $250 million. Obviously there is not a severe impact on the economy for the next 3 years under this legislation."

118 Cong. Rec. H 9122 (daily ed. October 4, 1972). (Emphasis added.) Plainly, when Representative Harsha spoke hypothetically of the obligation of "the" $5 billion authorization in fiscal 1973, there was an underlying assumption that the entire $5 billion would be available for obligation by allotment in that year. In describing the potential

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* *See* Senator Muskie's remarks quoted in the footnote at page 16 of the Government's brief.

spending impact, therefore, he spoke only in terms of obligation, not allotment.

A further statement by Representative Harsha when override of the veto was being considered removes all doubt:

> "I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications and estimates. *This is the pacing item in the expenditure of funds.* It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures."

Id. at H 10268 (daily ed. October 18, 1972). (Emphasis added.) Approval of "plans, specifications, and estimates" occurs when applicants seek under section 203(a) the *obligation* of allotted sums. Thus, Representative Harsha once again stated quite clearly his understanding that the Administrator's discretion to "pace" obligations, *i.e.*, to regulate the rate of spending, obtains after allotment.

Moreover, when the House on October 18, 1972 took up the bill after the veto, it is reasonable to assume that Representative Harsha and his fellow conferees from the House were aware of Senator Muskie's unequivocal statements of October 4 and 17 that the authorized amounts must be fully allotted in fiscal years 1973-1975. Yet, as in the Senate, no one disputed or even questioned that conclusion. *See* p. 12, *supra*.

(3) *The Veto Message.*

The President too seems to have construed the Act (in October of 1972) as conferring less power on the Executive than indicated by his directive a month later that the Administrator allot $5 billion instead of $11 billion. The veto message (118 Cong. Rec. S 18534 (daily ed. October 17, 1972)) spoke only of the bill having "technical controls" which conferred "a measure of spending discretion and flexibility." The "political realities" and "pressure for full funding . . . approaching the maximum authorized amount" which he referred to are more easily understood as bearing on the obligation stage—when state and local governments had fully planned particular projects—than on the preliminary and general allotment stage. The experienced conferees, in finally reaching an accommodation on the statutory language, presumably took political realities into account and were willing to accept any resulting dilution of the Administrator's control over the rate of spending that might result from political pressures.

POINT II

Discretion over allotment is inconsistent with the purposes and objectives of the Act.

In addition to the legislative history of the Harsha Amendments, the overall intent of the Act demonstrates convincingly that Congress did not intend to confer discretion at the allotment step of the funding mechanism. After a careful examination of the congressional reports and debates (11A-19A) the Court of Appeals concluded that Congress "manifest[ed] an intent to create a procedure which would *insure* that the total authorized funds would be made available to the states" 18A. (Emphasis added.) That conclusion is indeed inescapable. There are innumerable instances in the legislative history (recited in full in the opinion below) when Senator Muskie, Representative Harsha and other key legislators expressed the intent

to commit $18 billion to the states during the fiscal years 1973-75, to assist them in complying with the Act's standards and deadlines. Senator Muskie's remarks of October 4, 1972 are typical of these statements:

> "[T]hose who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this crisis.
>
> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that *a total of $18 billion had to be committed by the Federal Government in 75 percent grants to municipalities during fiscal years 1973-1975.* That is a great deal of money; *but that is how much it will cost to begin to achieve the requirements set forth in the legislation.*
>
> • • • •
>
> [T]here were two strong imperatives which worked together to convince the members of the conference that this much money was needed: first, the conviction that only a national commitment of this magnitude would produce the necessary technology; and second, the knowledge that a Federal commitment of $18 billion in 75-percent grants to the municipalities was the minimum amount needed to finance the construction of waste treatment facilities which will meet the standards imposed by this legislation.
>
> • • • •
>
> Mr. President, to achieve the *deadlines* we are talking about in this bill we are going to need the strongest

> kind of evidence of the Federal Government's commitment to pick up its share of the load. We cannot back down, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill. And the conferees are convinced that *the level of investment that is authorized is the minimum dose of medicine that will solve the problems we face.*"

118 Cong. Rec. S 16870-71 (daily ed. October 4, 1972). (Emphasis added.) The Administrator now also concedes, for the first time in this litigation, that it is "the Congressional intent that the full $18 billion authorized be expended on the program . . . ." Pet. Br. at p. 26.

The need for such a federal commitment becomes evident upon an examination of the Act's purposes and objectives. The Act declares in its very first section that "it is the national goal that the discharges of pollutants into the navigable waters be eliminated by 1985." Section 101(a)(1). To effectuate this goal Congress has provided that "except as in compliance [with the Act's provisions] . . . the discharge of any pollutant by any person shall be unlawful." Section 301(a). Attainment of certain waste treatment standards is required "in order to carry out the [Act's] objective" of eliminating pollutant discharges. Section 301(b). For publicly-owned sewage treatment works these standards include application of secondary treatment* by July 1, 1977 and of "the best practicable waste treatment technology over the life of the works" consistent with the

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* In primary treatment solid matter is settled out of sewage in sedimentation tanks. In the secondary treatment which follows, the sewage is placed in an aeration tank where microorganisms break down and consume waste matter which remains suspended in the sewage.

goals of the Act by July 1, 1983. Sections 301(b)(1)(B), 201(g)(2)(A).*

There is no way under the Act that state and local governments can opt out of this particular federal program. They must follow the course charted by Congress. Yet, after years of neglect, attainment of the prescribed standards *within the stated deadlines* is far beyond the resources of already strained municipal purses. This Congress recognized. Thus, in fashioning the Title II grant program, it was the congressional intent to assure federal aid which would substantially assist states and localities in their compliance efforts. *See,* FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1971, S. Rep. 92-414, 92nd Cong., 1st Sess. 35 (1971). A serious flaw in earlier programs was the lack of any such firm federal commitment, coupled with a perennial gap between federal authorizations and appropriations *Id.* at 5. The Title II grant program was accordingly designed to bind the federal government to provide such assistance and thereby to encourage the sustained planning and construction at the local level needed to achieve the Act's objectives within the stated deadlines. *See,* SENATE COMMITTEE ON PUBLIC WORKS, WATER POLLUTION CONTROL LEGISLATION, 92nd Cong., 1st Sess., pt. 1 at 521 (1971).

It is in this context that the Administrator's argument for discretionary allotment must be evaluated. It quickly becomes evident that such discretion is totally inconsistent with the purposes and objectives of the Act. Allotment

* Prior to the adoption of the Act in 1972, discharges from municipal sewers were not effectively controlled by federal water pollution legislation. For example, the discharges of municipalities were exempted from the prohibition of the Rivers and Harbors Act of 1899, 42 U.S.C. § 407. *United States* v. *Lindsay* 357 F. Supp. 784 (E.D.N.Y. 1973).

controls the total amount of money available to be spent. Discretion over allotments, even under the Government's new construction (*see,* Pet. Br., pp. 12-13, 24-27) of the Act permitting "initial" and "augmenting" allotments,* means that some of the sums authorized by section 207 conceivably may never be made available. The possibility of the permanent loss of unallotted sums is revealed in the Justice Department's letter to Senator Muskie, referred to at pp. 12-13 of the Government's brief as the basis for the construction adopted by the Administrator here:

> [T]he . . . statutory language [of section 205(a)] [means] that the President's best judgment under circumstances prevailing at the time as to the amounts that may be prudently allotted should be exercised by the statutory time limits. However, changed circumstances following those dates [specified in section 205 (a)] *might justify subsequent allotment of additional funds within and for the fiscal years specified,* in the President's discretion.

JOINT HEARINGS ON IMPOUNDMENT OF APPROPRIATED FUNDS BY THE PRESIDENT BEFORE THE AD HOC SUBCOMMITTEE ON IMPOUNDMENT OF FUNDS OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS AND THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE SENATE COMMITTEE ON THE JUDICIARY, 93rd Cong., 1st Sess. 840-41 (1973) (letter of Deputy Attorney General Sneed). (Emphasis added.)** If this inter-

* We refute the Administrator's contentions regarding this construction of the Act in Point III, *infra.*

** The Administrator here restates the Government's position in somewhat stronger terms than the Justice Department's letter would seem to permit. He contends that a subsequent allotment can be made *"at least* until the time when reallotment of funds not utilized was required under Section 205(b)." Pet. Br. at pp. 12-13 (footnote omitted). (Emphasis added.)

pretation of the Act is correct, it would appear that the $3 billion not allotted for fiscal year 1973 is already lost, because the fiscal years "specified" for that allotment by section 205(b) were fiscal years 1973 and 1974. Plainly then, the discretionary power to reduce allotments, to the extent that it carries with it the possibility of the loss of some of the sums authorized by section 207, contravenes the congressional intent to commit $18 billion to the states.*

Moreover, even absent the possibility of lapse, discretionary allotment would render impossible the local planning efforts that Congress intended to encourage with its firm commitment of $18 billion over three fiscal years. By making "initial" and periodic "augmenting" allotments the Administrator would, in effect, make money available to the grant program from time to time in the same manner as Congress might have under an ordinary authorization-appropriation process. Yet both houses rejected authorization-appropriation funding in favor of the more binding commitment represented by contract authority. *See,* 117 Cong. Rec. S 17445-47 (daily ed. November 2, 1971); 118 Cong. Rec. H 2721-2731 (daily ed. March 29, 1972). In the House debates on the subject Representative Harsha explained why a procedure for periodic funding of the grant program would be unacceptable:

* It should also be noted that the Administrator's attempted reconciliation of discretionary allotment with section 206(f)(1) (Pet. Br., pp. 28-29) only succeeds if it is conceded that there is no possibility of a reduction of the $18 billion by lapse. If a lapse can occur, as the Government seems to indicate, then a state's "expected allotment" under section 206(f)(1) cannot be ascertained. In such case the reasoning of the Court of Appeals holds: section 206(f)(1) would have "scant operative effect" if there were discretionary allotment. 33A.

"Because of the magnitude of this program, it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants, including the sale of bonds that they have to sometimes negotiate.

Now, this can only be accomplished if there is assured availability of Federal grant funds for future years. This necessary assurance is not provided by merely advancing appropriations for 1 year. That will not meet the needed assurance of long-term planning. This is a continuing program.

• • • •

The construction of a waste treatment plant consists of planning; economic and engineering feasibility studies; preliminary engineering for the preparation of plans, specifications, and estimates; the acquisition of land where appropriate; and the actual physical construction of the building itself. Under this legislation each one of these steps is ordinarily a separate project, a separate contract, and it is funded as completed or as work progresses. This is not the case under existing law where 25 percent of the total project must be completed before any payment can be made.

At the time any one of these preliminary steps is taken, such as the plans, specifications, and estimates, there is no *assurance that appropriated funds would be available* for subsequent projects for land acquisition and the actual building of this plant for which the plans, specifications, and estimates are being prepared. *This, therefore, makes the orderly continuous planning and scheduling of work impossible.*"

118 Cong. Rec. H 2727-28 (daily ed. March 29, 1972). (Emphasis added.)

Representative Harsha recognized, then, that "orderly continuous planning and scheduling of work [is] impossible" where "there is no assurance that . . . funds would be available" to help pay for all stages of a project. Under authorization-appropriation funding, of course, funds are not available until they are appropriated. Under the Act's contract authority funding, however, funds are available upon their allotment. Section 205(b)(1). Thus, planning depends directly upon allotment. Indeed the Administrator himself recognized this crucial fact in his petition for a writ of certiorari (p. 7), where he expressed concern that "allotments once made cannot be withdrawn, even if the Administrator's position is ultimately sustained on the merits, because of the reliance by the states on available allotments in their planning process."

If a state must wait for periodic allotment determinations by the Administrator, the level of funding needed to pay the state's share of a project will be uncertain. There would arise from such uncertainty, for example, obvious difficulties for state budget preparation and for the submission of a bond proposal to a referendum, where necessary. Yet section 204(a), in conjunction with sections 208 and 303(e), requires, as a condition of grant application approval, that states have a continuing planning process covering such matters as requisite financing measures, construction schedules and construction priorities. There is no way states and localities can effectively plan in these areas when the level of available federal funding is always changing.

Furthermore, discretion over allotments, even if it includes the power to make subsequent "augmenting" allotments, would totally frustrate the congressional mandate that certain standards be achieved within specific deadlines. It was the clear legislative design that the Title II grants would provide substantial assistance to states and localities in complying with the Act within the limited time allowed. Reduced allotments, even if subsequently "augmented," will prevent timely project initiations and thereby negate the possibility that the Act's overall goals will be attained in the time envisioned by Congress. And failure to achieve these goals in a timely manner subjects a municipality to the civil and criminal penalties set forth in the Act. *See, e.g.*, §§ 309, 505.

Thus, although the Administrator is correct in stating that control of allotment can be used to affect the rate of spending (Pet. Br., p. 25),* such effect is merely incidental to the much broader consequences of discretionary allotment. As we have demonstrated, reduced allotments would impinge upon many areas of the statutory program in a manner not envisioned by Congress. Discretion at the obligation stage, however, confers control over the rate of spending without destroying the credibility of the federal commitment and disrupting the continuity of planning that is essential to the program's success.

It is at the obligation stage that the Administrator must make the project assessments required by section 204(a), including an evaluation of the project under the section 208 and 303(e) plans. No funds are committed for expenditure, of course, until a project is approved pursuant to section 203. At this stage the Administrator can consider

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* *But see* our discussion at p. 12, *supra*.

all factors pertinent to expenditure without disturbing other important areas of the statutory scheme, such as planning. Rather, planning can be conducted by the states and localities with the knowledge that a specific, and constant, sum is available for obligation. It was thus entirely logical and consistent for Congress to confer control over the rate of spending at the obligation stage, while directing that $18 billion be made available at the outset of the program to guide local planning efforts.

POINT III

The Act and its legislative history negate the concept of "augmenting" allotments and the asserted power of the Administrator to choose the stage at which to exercise control over the rate of spending.

The thrust of the Administrator's argument here is that the Act can be—and should be—construed in a manner which reconciles discretionary allotment with the clear congressional intent that $18 billion be committed to the states.* To effectuate this reconciliation, the Administrator

* The Administrator's reliance on the deletion of the word "all" from section 205 (Pet. Br., pp. 22-23) adds nothing to his argument. As the Court of Appeals observed (20A), no conclusion can be drawn from this "syntactical change" without first studying its legislative history. We have already shown (pp. 8-17, *supra*) that the legislative history of this change demonstrates that it was made solely to emphasize the Administrator's power to control spending at the obligation stage.

Similarly, the Administrator's contention (Pet. Br., pp. 14-15) that the "not to exceed" language in section 207 confers discretion over allotments must fail because of the absence of any indication that Congress intended that language to have such effect. In discussing a 1970 appropriations bill (H.R. 1311, which was never enacted) which would have affected the Vocational Education Act of 1963 (20 U.S.C. §§ 1241-1391) by appropriating "not to exceed" a fixed sum, then Assistant Attorney General William H. Rehnquist concluded that "in the absence of any positive evidence that the intended effect of this ["not to exceed"] language is to permit the Commissioner [of Education] to allot less than the full sum in accordance with the statutory formula, we would still view these sums as not subject to impounding." HEARINGS BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS OF THE SENATE JUDICIARY COMMITTEE, EXECUTIVE IMPOUNDMENT OF APPROPRIATED FUNDS, 92nd Cong., 1st Sess. 289 (1971).

It is noteworthy that the Harsha Amendments consistently were characterized as merely "emphasizing"—as opposed to broadening—the Administration's control over the rate of spending. Once this is understood, it becomes clear that the words "not to exceed" merely serve to emphasize that an authorization is just that—permission to appropriate but not a requirement to appropriate. The Administrator may, of course, within the bounds of his discretion, *obligate* less than the sums available for obligation, in which case Congress will not be called upon to appropriate the full amount of the sums authorized. In essence, Congress has extended a line of credit to the Administrator: it has allowed him to commit "not to exceed" $18 billion. But since the Administrator can commit (*i.e.*, obligate) only allotted sums, it is clear from the face of the statute that $18 billion must be allotted.

contends that after a reduced "initial" allotment he may make subsequent "augmenting" allotments until the full $18 billion is "ultimately" allotted. Pet. Br., pp. 24-27. Since the $18 billion will be "ultimately" allotted, the Administrator continues, there is no "practical difference" between control over the rate of spending exercised at the allotment stage or at the obligation stage. Pet. Br. at p. 27. Finally, the Administrator asserts that the choice of whether to exercise spending control at the allotment or obligation stage should be left to his expert judgment. Pet. Br., pp. 29-30.

There is, however, absolutely no basis for the Administrator's reading of the Act. In support of the contention that he may make "initial" and "augmenting" allotments, the Administrator can point to no language in the statute, no discussion in the committee reports, no remarks in the legislative debates. Rather, he merely states that "there

is nothing in the statute which indicates any congressional intention to preclude the Administrator from subsequently allotting sums not initially allotted during the year for which the sums were authorized." Pet. Br. at p. 26. But "legislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber* v. *Allen,* 396 U.S. 168, 186 (1969) (Harlan, J.). Indeed, under the theory of statutory construction advanced by the Administrator, Congress must affirmatively legislate against every possible action by an administrative official that it does not intend, or risk having its silence read as authorization. *Reductio ad absurdum,* the more removed the administrative action is from the statutory scheme, *i.e.,* the more unforeseeable, the less likely that Congress will legislate against it and, hence, the stronger the argument for its "authorization by silence."

There is, in any event, abundant evidence in both the Act and its legislative history that Congress intended that the full $18 billion be made available by allotment in the three years specified in section 207, and not at some indefinite later time. Section 205(a) provides, *inter alia,* that:

> Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972.

Quite plainly, section 205(a) conceives of only one allotment for each fiscal year authorization. Subsequent

"augmenting" allotments would violate the clear command that allotment *shall* be made "not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized." Moreover, the statute speaks in terms of "the" allotment, further indicating singularity. It is well-established that when a statute provides that something be done one way, all other methods are excluded. *See, Botany Worsted Mills* v. *United States,* 278 U.S. 282, 289 (1929).

It is also significant that, while Congress carefully provided, in section 205(b)(1), for the contingency of less than full obligation of allotted sums, it made no provision concerning less than full allotment of authorized sums. Plainly, the reason for this "omission" was that the latter contingency was never envisioned.

We have already shown that the legislative history fully supports our reading of section 205(a). *See* pp. 17-26, *supra.* The congressional debates are replete with statements by sponsors and other legislators that the $18 billion would be allotted in the three fiscal years ending in fiscal year 1975. *See* 13A-18A. Obviously Congress never contemplated allotments beyond the years enumerated, as would be the case with subsequent "augmenting" allotments; otherwise those legislators would not have repeatedly spoken with such certainty of a three-year allotment period.

Thus, the question of the "practical differences" between spending control at the allotment and obligation stages is not even pertinent here, for the Act does not leave room for the construction advanced by the Administrator. But even if such an interpretation of the Act were plausible,

there would be serious "practical differences" arguing against it, as we have demonstrated. *See* pp. 20-26, *supra.*

Finally, the Administrator contends that the Court should defer to his expert judgment and permit him to choose at what stage in the funding mechanism to exercise spending control. Pet. Br., pp. 29-30. Assuming, again, that it were even arguable that the Act might permit the exercise of discretion at the allotment stage, the Administrator still cannot overcome the clear legislative intent of the Harsha Amendments (*see* POINT I, *supra*) that rate of spending control may only be exercised at the obligation stage. The proper test is not what construction the Administrator prefers among those theoretically possible, but what did Congress actually intend: "We are reluctant to attribute such intent to Congress and, simply in the name of administrative expertise, to follow a path not marked by the language of the statute." *Zuber* v. *Allen, supra,* 396 U.S. at 181.

CONCLUSION

The judgment of the Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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